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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 19

Case No. .....

79-1577

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

DAVID L. HEILMAN,
Defendant-Appellant.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

To the Honorable the Chief Justice of the Supreme Court of the United States and Associate Justices of the Supreme Court of the United States:

This is the petition of David L. Heilman for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled case.

OPINIONS DELIVERED IN COURTS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been reported; it is printed in the appendix to this petition at App. 157.

JURISDICTIONAL STATEMENT

The opinion, order and judgment of the Seventh Circuit Court of Appeals sought to be reviewed were dated and entered February 8, 1980. (App. 157.) The judgment of the Court of Appeals in this case is a final judgment. The statutory provision believed to confer jurisdiction on this Supreme Court to review this case is 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Is the duplication of recordings fixed prior to February 15, 1972 within the protection of the compulsory license provisions of 17 U.S.C. sec. 1(e)?

2. Are the provisions of 17 U.S.C. sec. 1(e) and sec. 101(e) sufficiently definite so as to constitute a basis for a criminal violation?

3. Are the criminal sanctions of 17 U.S.C. sec. 101(e) applicable with respect to duplication of recordings fixed prior to February 15, 1972, where the compul-

sory license provisions of 17 U.S.C. sec. 1(e) have been met?

4. Did David L. Heilman willfully violate any provisions of the Copyright Act?

5. Was David Heilman entitled to a hearing and an opportunity to prove that he was the victim of an unlawful, selective prosecution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case concerns the interpretation and application of 17 U.S.C. secs 1(e) and 104 (as amended Oct. 15, 1971). The decision in the court below also denies Heilman his rights under the First and Fourteenth Amendments of the United States Constitution. These statutory and constitutional provisions are printed in the Addendum to this Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A. Nature of This Case.

This is a criminal prosecution for alleged violations of the copyright law. Defendant-Appellant, David L. Heilman, had been engaged in the business of producing and marketing anthologies of selections from popular music recordings made before February 15, 1972. In March, 1977, a grand jury indictment was filed against him in the Northern District of Illinois for alleged willful infringement of copyrights in violation of 17 U.S.C. sec. 1, sec. 101(e), and sec. 104 and for mail fraud in violation of 18 U.S.C. 1341. The mail fraud counts subsequently were dismissed, and Heilman was found guilty on 18 counts of copyright infringement. This appeal is from those misdemeanor convictions.

Prior to the commencement of this criminal action Heilman had commenced an action for a declaratory judgment in the United States District Court for the Eastern District of Wisconsin, in which action he sought a ruling that his activities did not constitute a violation of the copyright law. On July 14, 1977, after the criminal indictment already had been filed in Illinois, the District Court in Wisconsin ruled that Heilman's activities violated the copyright law and judgment was entered against him. *Heilman v. Bell*, 434 F. Supp. 565 (E.D. Wis. 1977). The District Court's ruling subsequently was affirmed by a divided Court of Appeals, 583 F.2d 393 (7th Cir. 1978), and certiorari was denied by the

United States Supreme Court, 98 S.Ct. 1499 (1978).

B. Statement of the Facts.

The facts of the case, as set forth in the affidavits of David L. Heilman (App. 101, 112, 116) and the stipulations of the government (App. 137) and the Defendant (App. 124), are not in dispute. David Heilman is a businessman and was president of E.C. Tape Service, Inc. until April, 1976. The company was engaged in the business of producing and marketing original anthologies of recorded music.

The recording industry in which he was involved is controlled principally by large record companies. (App. 109.) Each large recording company owns one or more publishing companies. These publishing companies in turn own the copyrights on numerous compositions. In addition, the recording companies own contracts with recording artists. Typically these contracts provide that all the costs of record production, except for the cost of record pressing (32 to 37 cents per album), are charged against the royalties payable to the artists. In addition, the unrecovered costs of one record can be, and frequently are, charged against the royalties of any subsequent record. These contracts typically last for seven years. By these methods the major recording companies have gained control over 80% of the major copyrights of musical compositions. (App. 109.)

E-C Tape was engaged in the business of producing and marketing original anthologies of recorded music. In producing these anthologies only music that was recorded or "fixed" prior to February 15, 1972, was utilized. These

recordings were based on *compositions* protected by the copyright laws. With respect to all such copyrights Heilman and E-C Tape tendered the two cents per copy royalty in compliance with 17 U.S.C. sec. 1(e). They tendered in excess of $150,000.00 to the publishers of musical compositions for compositions re-recorded by E-C Tape. (App. 109.)

Prior to entering into this business activity Heilman sought the advice of counsel concerning its legality. All of the attorneys he consulted advised him that, if he paid or tendered payment of the compulsory license fee or royalty provided for at 17 U.S.C. sec. 1(e). to the composition copyright owner, his duplication of musical recordings would not be in violation of the copyright law. (App. 102, 125, 127-136.)

In October, 1971, Congress amended the copyright law, effective February 15, 1972, and created a copyright interest in the sound recordings themselves. Pub. L. 92-140, 85 Stat. 391 (Oct. 15, 1971). At the same time, Congress authorized criminal sanctions for unauthorized duplication of copyrighted recordings fixed after February 15, 1972, and for copying of existing recordings of copyrighted musical works where the statutory royalty is not paid to the holder of the musical copyright.

After passage of Pub. L. 92-140 Heilman again sought the advice of legal counsel, who advised him that sound recordings made or "fixed" prior to February 15, 1972, had not been afforded copyright protection by Pub. L. 92-140, and that, provided the statutory royalty was paid or tendered, the duplication of such recordings was not

unlawful. (App. 102, 124, 127-136.) The Criminal Division of the United States Justice Department was of the same opinion, publishing in April, 1973, a pamphlet entitled "Copyright Protection of Sound Recordings", in which it declared that the unauthorized duplication of sound recordings "fixed" prior to February 15, 1972, was not unlawful, (App. 103-104.)

At about the same time the United States Supreme Court reviewed 17 U.S.C. sec. 1(e), as amended, to determine whether or not Congress had pre-empted state legislation granting copyright protection to sound recordings fixed prior to February 15, 1972. The Court concluded there was no federal copyright protection for such recordings and, therefore, the state law in question was proper, *Goldstein v. California*, 412 U.S. 546, 568, 571 (1973). In reaching this conclusion the Court discussed the extent of the *composition copyright* interest and determined that "composers were to have *no control* over the *recordings* themselves", Id. at 566 (emphasis added).

Subsequently, on September 3, 1976, Congress, once again amending 17 U.S.C. sec. 1(e), Pub. L. 94-553, 90 Stat. 2541 (Oct. 19, 1976), for the first time expressed an understanding that the unauthorized duplication of sound recordings "fixed" prior to February 15, 1972, might not have been lawful. Congress changed the law with respect to the statutorily provided compulsory license provided for copyrighted musical works, to make it clear that persons were not to be entitled to the compulsory license for the purpose of making unauthorized duplications of musical sound recordings.

Heilman was an active and vocal opponent of these changes in the copyright law and he lobbied vigorously against them. He also wrote to the Justice Department to protest its change in position regarding the duplication of sound recordings fixed prior to February 15, 1972. (App. 122-123.) In February, 1975, several days after he had written his protest letter to the Justice Department that Department sent a memorandum to the local office of the Federal Bureau of Investigation requesting that Heilman's business be investigated (App. 121.).

On March 31, 1977, a criminal indictment was filed against Heilman in the Northern District of Illinois. This indictment alleged that when David Heilman, two years earlier, on May 15, 1975, duplicated certain sound recordings that had been fixed prior to February 15, 1972, he had committed a criminal act, notwithstanding that he had paid or tendered payment of the compulsory royalty or license fee provided for at 17 U.S.C. sec. 1(e). This prosecution resulted in the misdemeanor convictions that are the subject of the instant appeal.

Reasons For Allowance Of The Writ.

I. DAVID HEILMAN WAS CONVICTED UNDER A LAW WHICH IS UNCONSTITUTIONALLY VAGUE AND INDEFINITE.

The American criminal justice system provides for persons to have the right to know what actions constitute criminal behavior. It is incumbent upon legislatures to draft statutes that are clear and unambiguous when

they would make certain conduct a crime. David L. Heilman is charged with criminal violation of the copyright law. In duplicating records fixed prior to February 15, 1972, Heilman relied on his tendering of the compulsory licensing fee to be in full compliance with the law. The Justice Department shared this view of what constituted compliance as late as June, 1974.[1] It was only after rulings by divided Appeal Courts in four circuits that the Justice Department changed its interpretation of the statute, and the instant prosecution was initiated.[2]

Criminal statutes are subject to strict interpretation. *United States v. Campos-Serrano*, 404 U.S. 293, 297 (1971). Vague and indefinite statutes fail to meet the fair warning requirement that is embodied in the Due Process Clause of the Constitution. *United States v. Harriss*, 347 U.S. 612, 617 (1954). If offenses can be made constitutionally definite by a reasonable construction of the statute, the Supreme Court has said it is "under a duty to give the statute that construction". Id. at 618.

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[1] Correspondence of Assistant Attorney General Murphy in response to questions by the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee of the Judiciary, regarding Senate Bill 3976, subsequently enacted into law as P.L. 93-573; Memorandum No. 798-Subject: Sound Recording Piracy — Violations of 17 U.S.C. 174, to all United States attorneys (App. 104).

[2] *Duchess Music Corp. v. Stern*, 458 F.2d 1305 (9th Cir. 1972), cert. denied, 409 U.S. 847 (1972); *Edward B. Marks Music Corp. v. Colorado Magnetics, Inc.*, 497 F.2d 488, aff'd on rehearing en banc, 497 F.2d 492 (10th Cir. 1974), cert. denied, 419 U.S. 1120 (1975); *Jondora Music Publishing Co. v. Melody Recordings, Inc.*, 506 F.2d 392 (3rd Cir. 1974, as amended 1975), cert. denied, 421 U.S. 1012 (1975); *Lone Publishing Co. v. Alabama Custom Tape, Inc.*, 507 F.2d 667 (5th Cir. 1975), cert. denied, 423 U.S. 841 (1975).

Unfortunately, the Supreme Court has chosen not to interpret the statutory language at issue here. It denied certiorari in all four circuit court cases, cases which were decided by divided courts. "Similar use", though defined by a number of judges, has not received construction by the Supreme Court, construction necessary to provide definiteness and validity for the statute. (Indeed, that language was not construed by the District Court in the declaratory ruling action, nor by this Seventh Circuit Court of Appeals, until after criminal charges had been filed against Heilman.)

Indefiniteness in federal criminal statutes is constitutionally objectionable in that not only does it deprive one of the right to be informed of what constitutes criminal activity, but also, it in effect delegates to judges and juries the legislative power to determine what acts will be criminal. *United States v. L. Cohen Agency*, 255 U.S. 81, 89 (1920). The present case is an illustration of judicial lawmaking. Four divided Circuit Courts interpreted the phrase "similar use". The trial court below then applied the majority's interpretation to impose criminal sanctions on Heilman for his activities on May 15, 1975. On that date only two of the four cases had been concluded.[3] The definition of "similar use" and the applicability of compulsory licensing had not yet been decided. In fact, it was not until 1976 that Congress clarified that language and specifically made activity such as Heilman's criminal. If such activities

[3] *Duchess Music Corp.*, cert. denied October 10, 1972.
Edward B. Marks Music Corp., cert. denied January 20, 1975.

were illegal prior to the 1976 amendments, as the trial court has held, why did Congress see fit to amend the law specifically to make such actions illegal?

Retroactive application of statutory interpretation also constitutes a deprivation of the right to due process. *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964). Until the decisions of the Circuit Courts began to appear, the tendering of the compulsory licensing fee generally was considered to satisfy legal requirements for duplication of records fixed prior to February 15, 1972. (App. 103-105.) Following several of the Appeals Court decisions, the compulsory licensing fee suddenly became not available for duplication of records fixed prior to February 15, 1972. Retroactive application of a disputed standard in a criminal prosecution is a clear denial of Heilman's rights.

The law under which Heilman was indicted is vague and uncertain. This proposition is supported by the congressional action taken in 1976 to clarify it. Criminal sanctions were imposed upon Heilman for alleged violation of an indefinite, vague statute. This clearly constituted a denial of due process. The conviction should be overturned.

II. AS A MATTER OF FACT AND AS A MATTER OF LAW, HEILMAN WAS NOT GUILTY OF A WILLFUL VIOLATION OF THE COPYRIGHT ACT.

A. Heilman's actions demonstrate a clear desire to comply with all provisions of the copyright act.

The record in the present case is very clear. Heilman made every possible attempt to ascertain any and all restrictions the copyright laws imposed upon his activities as a duplicator and vendor of re-recorded music. All of his activities were done publicly, with the understanding, supported by attorney opinions, that his actions were legal.

Heilman acted in good faith. He sought the advice of counsel. He notified the holders of copyrights whenever he intended to make use of the compulsory licensing provision of the Copyright Act. He tendered the statutory fees for the licensing. He used only records fixed prior to February 15, 1972 in producing musical anthologies. He complied in all respects with the law as he had been advised by his attorneys. He lacked the willful intent necessary to violate the law.

This case involves a criminal prosecution. The statutory language is clear that copyright infringement must be committed "willfully" in order to be subject to criminal penalties. 17 U.S.C. 104. Although, in the civil context, there is strict liability for copyright infringement, "the criminal law casts a smaller net". *United States v. Bily*, 406 F.Supp 726, 733 (E.D. Pa. 1975). In order to convict Heilman of criminal violations of the Copyright Act, the government must show that Heilman infringed copyrights of others, and that these infringements were willful. Assuming *arguendo* that Heilman did commit copyright infringement, the element of *willful* infringement is lacking. Heilman may be civilly, but he cannot be criminally, liable.

Any federal statute containing the word "willfully"

requires a showing of specific intent to violate the statute. In *United States v. Mongiello*, 442 F.Supp. 835 (E.D. Pa. 1977), the court observed that "willfully" requires that "specific intent must be proved beyond a reasonable doubt in order to obtain a conviction". *Id.* at 838. Specific intent requires an element of bad or evil purpose. The government must prove that the Defendant knowingly did an act the law forbids. *United States v. Haldeman*, 559 F.2d 31, 114 (D.C. Cir. 1976), cert. denied sub nom. *Ehrlichman v. United States*, 431 U.S. 933 (1977).

In the present case Heilman could not knowingly have performed an act the law forbids. He acted on his attorney's advice that he was acting within the law. Heilman had no bad or evil purpose. He complied with the law as it generally was understood and interpreted at the time.

In testimony at trial Thomas M. Kells, one of Heilman's attorneys, stated his advise to Heilman:

> ". . . that as long as he paid the two cents, I could not see how he was infringing upon the rights of the copyright holder because, again, the copyright holder is entitled to one thing; that is the payment of the royalty or the compulsory licensing fee. And as long as he did that, I could not see anything wrong with it from a criminal standpoint". Excerpt of Proceedings at 49-50 (January 30, 1979).

Attorney Robert Sosnay testified that in May of 1975, the time of the alleged violations, he had advised Heilman:

> ". . . it was my opinion that as long as Mr. Heilman complied with the compulsory license and all of its provisions and did

not re-record any records that were fixed after 1972 and also complied with several civil injunctions that were pending — that I felt that he would be acting within the law as I knew it". Excerpt of Proceedings at 6 (January 30, 1979).

In *United States v. Critzer*, 498 F.2d 1160 (4th Cir.1974), the court found, in a tax conviction case, that if a law is vague or debatable, a defendant actually or imputedly lacks the requisite intent to violate it. The Court rejected Critzer's arguments with respect to tax exempt income, but overturned the conviction on the basis that the "requisite intent to evade and defeat" the law was missing. 498 F.2d at 1162. Heilman's actions are uncontroverted and they demonstrate a desire to comply with the provisions of the law. His conviction should be overturned.

B. A review of the history of the copyright act demonstrates that a willful violation of the law was impossible.

A finding that Heilman is guilty of criminal copyright infringement must be based on a showing that Heilman intended to violate the provisions of the Copyright Act. A review of the history of the copyright law shows that such intent was not possible. Congress itself did not define what constituted illegal activity until after Heilman had done that which was the basis for his conviction.

This present case is concerned with the law applicable to activities pursued prior to January 1, 1978,

the effective date of the copyright law revision of 1976.[4] The copyright revision is not applicable to such activities.[5]

In 1909 Congress extended the copyright protection of a musical composer to recordings of his composition, but conditioned that protection upon the granting of a compulsory license.[6] Accordingly, the law as it existed before the enactment of the Sound Recording Act of 1971, Public Law 92-140, 85 Stat. 91 (October 15, 1971), was as follows:

"(1) The composer or publisher was entitled to a composition copyright which included mechanical reproductions of his composition, 17 U.S.C. sec. 1 (e);
(2) No copyright existed with respect to the mechanical reproductions themselves, i.e., records, piano rolls, tapes; only the compositions used in the records or tapes were protected;
(3) Once the owner of the composition copyright allows another to mechanically reproduce the musical work any other person may make a 'similar use' of the composition upon the payment of two cents (per copy) to the composition copyright holder, 17 U.S.C. sec. 1(e);
(4) No criminal action would lie with respect to infringement of the composition copyright by unauthorized mechanical reproduction, 17 U.S.C. sec. 101(e)." *Heilman v. Levi*, 391 F. Supp. 1106, 1109 (E.D. Wis. 1975).

[4]Pub. L. 94-553, 90 Stat. 2541, 2598-2599, sec. 102. (October 19, 1976); U.S. Code Congressional and Administrative News, 94th Cong., 2d Sess., pp. 2541, 2598, 2599.

[5]Id., sec. 112.

[6]"And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured. . . ." 17 U.S.C. sec. 1(e).

In 1971 Congress amended the copyright law. It extended protection to sound recordings and made it a crime to duplicate records fixed after February 15, 1972. Additionally, the amendment made "criminal sanction immediately available to prevent piracy of already existing recordings of copyrighted musical works *where the pirate does not pay the statutory royalty* to the holder of the musical copyright".[7] Congress made duplication of recordings fixed prior to February 15, 1972 a crime only in the event the statutory royalty was not paid or tendered.

It was not until September 3, 1976 that Congress, in again amending the copyright law, for the first time expressed an understanding that Heilman's action in creating musical anthologies by duplicating records fixed prior to February 15, 1972, might be unlawful. Stating that its 1976 Amendments dealt with "three doubtful questions under the present law", it went on to say:

> "The basic intent of *this sentence is to make clear that a person is* not entitled to a compulsory license of copyrighted musical works for the purpose of making an unauthorized duplication of a musical sound recording originally developed and produced by another. It is the view of the Committee that such was the original intent of the Congress in enacting the 1909 Copyright Act, and it has been so construed by the 3d. 5th, 9th and 10th Circuits. . . ."[8]

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[7] H.R. Rep. No. 92-487, 92nd Cong., 1st Sess. 9 (1971) (emphasis added).
[8] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 107-108 (1976) (emphasis added).

This Congressional clarification came too late for David Heilman!

Until January 20, 1975, activities such as Heilman's were "legal" in the eyes of the Justice Department. (App. 103-104.) On that date, the U.S. Supreme Court denied certiorari in the case *Edward B. Marks Music Corp. v. Colorado Magnetics, Inc.*, supra, and the Justice Department announced that henceforth persons selling duplicates of records fixed prior to February 15, 1972 would be subject to prosecution.

Heilman sought a declaratory judgment in the United States District Court for the Eastern District of Wisconsin, stating that his activities did not constitute a violation of the copyright law. While that action was pending, an indictment was filed in the United States District Court for the Northern District of Illinois, for criminal copyright infringement. If the law is not clear, how can one willfully violate it?

What number of judicial decisions is necessary before an interpretation becomes the law? Is it not the role of Congress to enact specific, definite laws? Congress did not "make clear" its intent regarding a "doubtful" question of copyright law until after David Heilman had done the acts which now are alleged to justify a criminal prosecution. He should not be required to endure punishment as a criminal. As a matter of law, he could not have had the criminal intent necessary to commit the crime of which he is accused.

III. DAVID HEILMAN IS A VICTIM OF A SELECTIVE PROSECUTION.

Defendant David Heilman is one of thousands who was in the business of re-recording selections of popular music. He is the *only* person in the United States to face criminal prosecution for duplicating sound recordings fixed prior to February 15, 1972. Excerpt of Proceedings at 12 (January 30, 1979) (statement by prosecutor).

Heilman is one of the few persons who have been vocal in their opposition to the government's actions in copyright protection of sound recording matters. He has been an outspoken critic of the recording industry and has taken positions against both the government and the industry. He has lobbied the Congress in opposition to industry sponsored legislation (App. 107-109, 122-123), and he even wrote to the Justice Department protesting its change in position regarding the meaning of the language of the copyright law. Significantly, unlike any other misdemeanor prosecution, the criminal investigation and prosecution of Heilman was initiated not at the local level but in Washington, only a few days after he had written the Department to protest its action. (App. 121.)

Equal protection of the law is denied when the government enforces a statute in a discriminatory fashion. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972). Although a statute, on its face, may be non-discriminatory, it is possible for equal protection to be denied by the fact that the statute is enforced with respect only to a select few, or, as in the present case, only one. Although it is well established that the prosecutor may exercise discretion in deciding which violations he wishes to prose-

cute, *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965); *United Sates v. Cowan*, 524 F.2d 504 (5th Cir. 1975), such may not be based upon impermissible grounds such as race, religion, or the exercise of one's First Amendment right to free speech. *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973).

Heilman is entitled to dismissal of the charges against him if he can show that the government purposely discriminated against him for exercising his First Amendment rights. *Steele*, supra. A defendant who establishes a prima facie case of selective prosecution is entitled to a full evidentiary hearing. *Falk*, supra. To establish a prima facie case of selective prosecution Heilman must demonstrate that he has been singled out for prosecution while others similarly situated have not been prosecuted for similar conduct, and that the government's selection for prosecution was based upon impermissible grounds such as race, religion, or the exercise of the First Amendment right to free speech. *United States v. Catlett*, 584 F.2d 864 (8th Cir. 1978); *United States v. Berrios*, 501 F.2d 1207 (2nd Cir. 1974).

It is undisputed that Heilman is the only person ever prosecuted for duplicating musical recordings fixed prior to February 15, 1972. It is equally uncontroverted that *he is one among many persons who engaged in this activity*. (App. 107.). It is clear that the Justice Department chose to prosecute Heilman for alleged copyright violations and chose not to prosecute any others. The singling out of David Heilman for prosecution is suspect.

In addition to being President of E-C Tapes, Inc. and

a duplicator of sound recordings fixed prior to February 15, 1972, David Heilman was an outspoken lobbyist on behalf of so-called "record pirates". He was an activist who spoke out often and loudly against the recording industry and its attempts to exert total control over the production of musical tapes and records. He also spoke out against the government and its cooperation and compliance with the recording industry. Heilman exercised his First Amendment right to free speech in openly expressing his views on so-called "record piracy" laws, and as a result he has been rewarded by being chosen by the government to be the only person ever prosecuted for copyright infringement of records fixed prior to February 15, 1972.

Heilman specifically alleged in his Affidavit of May 12, 1977, that, "in all of the aforesaid investigations [those prior to October 31, 1974] *and investigations made thereafter*, not one 'tape pirate', other than defendant in this action, has been criminally prosecuted for the re-recording or sale of musical compositions originally recorded prior to February 15, 1972, where the compulsory license fee was tendered". (App. 107). Thomas Gramuglia, in an Affidavit executed on April 30, 1977, at pp. 2-3, stated that, "to the best of his knowledge and belief, there has never been a prosecution for the re-recording of musical compositions . . . until 1977", when Heilman was indicted. (The Gramuglia Affidavit was attached as Exhibit F to Heilman's Affidavit of May 12, 1977 (App. 107).)

At the same time, however, other persons were duplicating records fixed prior to February 15, 1972, without being prosecuted. Compare *Pearl Music Co. v. Recording industry Association of America, Inc.*, 460 F. Supp. 1060, 1063-1064, 1066 (C.D. Cal. 1978) with Excerpt of Proceedings at 12 (January 30, 1979) (statement by prosecutor in this case).

Despite the existence of many who duplicated such recordings in a like fashion, Heilman was the *only* one prosecuted. This is a prima facie example of selective prosecution. The Circuit Court erred in failing to recognize such and provide Heilman with an evidentiary hearing.

Assuming *arguendo* the validity of the statute under which Heilman is charged, the selection of the outspoken Heilman as the only person ever to be so charged raises the critical question of selective prosecution. The undisputed facts of this case establish, at the very least, a prima facie case of selective prosecution. The charges against Heilman should be dismissed on the grounds that he has been denied equal protection under the law. In the alternative, the conviction should be vacated and the case remanded to the trial court for an evidentiary hearing on the issue of selective prosecution.

CONCLUSION

David Heilman has been convicted of willful criminal conduct for engaging in an activity that his lawyers had every reason to advise him was lawful, prior to Congress' clarification and amendment of the copyright law to make it criminal and even before it judicially was declared to be unlawful in this circuit, on the basis of a misdemeanor prosecution initiated in Washington. His conviction should be overturned, or, in the alternative,

the case should be remanded to the District Court for an evidentiary hearing regarding the Justice Department's selection of him for prosecution.

Respectfully Submitted,
LAWTON & CATES

BRUCE F. EHLKE
Attorney for
David L. Heilman

ADDENDUM

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation

therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may be a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Public Law 92-140
92nd Congress, S. 646
October 15, 1971

An Act

85 STAT. 391

To amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 17 of the United States Code is amended in the following respects:

Sound recordings. Copyright. Limitations. 61 Stat. 652; 66 Stat. 752.

(a) In section 1, title 17, of the United States Code, add a subsection (f) to read:

"To reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound recording: *Provided*, That the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording: *Provided further*, That this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; or to reproductions made by transmitting organizations exclusively for their own use."

(b) In section 5, title 17, of the United States Code, add a subsection (n) to read:

"Sound recordings."

Copyright notice, form. 68 Stat. 1032.

(c) In section 19, title 17, of the United States Code, add the following at the end of the section: "In the case of reproductions of works specified in subsection (n) of section 5 of this title, the notice shall consist of the symbol Ⓟ (the letter P in a circle), the year of first publication of the sound recording, and the name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner: *Provided*, That if the producer of the sound recording is named on the labels or containers of the reproduction, and if no other name appears in conjunction with the notice, his name shall be considered a part of the notice."

Notice, location.

(d) In section 20, title 17, of the United States Code, amend the first sentence to read: "The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical either upon the title page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music, or if a sound recording on the surface of reproductions thereof or on the label or container in such manner and location as to give reasonable notice of the claim of copyright."

Definitions.

(e) In section 26, title 17, of the United States Code, add the following at the end of the section: "For the purposes of this section and sections 10, 11, 13, 14, 21, 101, 106, 109, 209, 215, but not for any other purpose, a reproduction of a work described in subsection 5(n) shall be considered to be a copy thereof. 'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture. 'Reproductions of sound recordings' are material objects in which sounds

Supra.

other than those accompanying a motion picture are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, and include the 'parts

85 STAT. 392

of instruments serving to reproduce mechanically the musical work', 'mechanical reproductions', and 'interchangeable parts, such as discs or tapes for use in mechanical music-producing machines' referred to in sections 1(e) and 101(e) of this title."

61 Stat. 652. 17 USC 1. Infra.

SEC. 2. That title 17 of the United States Code is further amended in the following respect:

In section 101, title 17 of the United States Code, delete subsection (e) in its entirety and substitute the following:

Copyrighted music, unauthorized use. 61 Stat. 661.

"(e) INTERCHANGEABLE PARTS FOR USE IN MECHANICAL MUSIC-PRODUCING MACHINES.—Interchangeable parts, such as discs or tapes for use in mechanical music-producing machines adapted to reproduce copyrighted musical works, shall be considered copies of the copyrighted musical works which they serve to reproduce mechanically for the purposes of this section 101 and sections 106 and 109 of this title, and the unauthorized manufacture, use, or sale of such interchangeable parts shall constitute an infringement of the copyrighted work rendering the infringer liable in accordance with all provisions of this title dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to section 104 of this title. Whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice."

Notice.

Effective dates.

SEC. 3. This Act shall take effect four months after its enactment except that section 2 of this Act shall take effect immediately upon its enactment. The provisions of title 17, United States Code, as amended by section 1 of this Act, shall apply only to sound recordings fixed, published, and copyrighted on and after the effective date of this Act and before January 1, 1975, and nothing in title 17, United States Code, as amended by section 1 of this Act, shall be applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before the effective date of this Act.

Approved October 15, 1971.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 92-487 (Comm. on the Judiciary).
SENATE REPORT No. 92-72 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 117 (1971):
Apr. 29, considered and passed Senate.
Oct. 4, considered and passed House, amended.
Oct. 6, Senate agreed to House amendments.

TITLE 17 UNITED STATES CODE

COPYRIGHTS

(AS AMENDED OCTOBER 15, 1971)

§ 1. EXCLUSIVE RIGHTS AS TO COPYRIGHTED WORKS.—Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: *Provided*, That the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically

the musical work, shall include only compositions published and copyrighted after July 1, 1909, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights. And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the 20th day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the 20th of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. It shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

In case of failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand, the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this title, not exceeding three times such amount.

The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.

(f) To reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound recording: *Provided*, That the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording

in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording: *Provided further*, That this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; or to reproductions made by transmitting organizations exclusively for their own use.

. . . .

(e) INTERCHANGEABLE PARTS FOR USE IN MECHANICAL MUSIC-PRODUCING MACHINES.—Interchangeable parts, such as discs or tapes for use in mechanical music-producing machines adapted to reproduce copyrighted musical works, shall be considered copies of the copyrighted musical works which they serve to reproduce mechanically for the purposes of this section 101 and sections 106 and 109 of this title, and the unauthorized manufacture, use, or sale of such interchangeable parts shall constitute an infringement of the copyrighted work rendering the infringer liable in accordance with all provisions of this title dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to section 104 of this title. Whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice.

. . . .

§ 104. Willful infringement for profit

Any person who willfully and for profit shall infringe any copyright secured by this title, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than $100 nor more than $1,000, or both, in the discretion of the court: *Provided, however*, That nothing in this title shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit. July 30, 1947, c. 391, § 1, 61 Stat. 652.